THE TEACHING OF LAW IN COLLEGIATE SCHOOLS OF BUSINESS

From a survey of the history of commercial education in England and America there evolves a curious fact—that attempts to teach the merchant his law through books are just as old as the movement which transferred from the merchant to the Common Law Courts the supreme authority to declare that law.[1] Lord Coke was conducting his fierce onslaught on special courts at the beginning of the seventeenth century; and it is to a contemporary of his that we owe the first of a long series of books on the *Lex Mercatoria*. In other words, the collegiate schools of business of today are simply attempting to do systematically what always had to be accomplished somewhere, somehow, in the making of the complete merchant.

Assuming—though not without cognizance of a respectable opposition[2]—that it is proper to undertake this work in business schools of various grades, from the commercial high school to the collegiate and graduate school of business administration, the problems of the teacher as to the place, the method, the scope and content, and the purpose of courses in business law revolve around the question whether this systematic study is to be pursued as a branch of business or as a branch of law. That business law can be taught as a branch of business is either a heresy or a truism; but neither heresies nor truisms are invariably wrong or useless. If the notion be heretical, it is, at least, an aged and hardened sinner, going back to the days of apprenticeship. If, on the other hand, it is a truism, it is one so imperfectly recognized in current practice that a consideration of some of the simple corollaries flowing from it is most timely and justifiable.

[1] Such a survey has been attempted by the writer in "The Merchant and His Law," in *Journal of Political Economy*, XXIII (1915), 529–61.

[2] Cf. the writer's account of a round-table conference on the subject in the *American Economic Review*, March, 1916.

To get at this matter concretely, by the case method, so to speak, let us take a business case almost at random, one of a kind that might profitably be given to a law-school class, as well as to a business-school class. By reference to this or any other typical case, we may illustrate: (1) the difference in the points of view of the two classes, and its bearing on the nature of the problem; (2) the difference in the lessons to be learned from the same material by the two classes, and its bearing on the question of purpose; (3) the difference in the broader mental associations with which the new experience of the case becomes connected in the minds of the two classes, and its bearing on the question of scope and content; (4) and finally, as a consequence of these considerations, the difference in the methods that suggest themselves for pursuing the subject in the two classes from the pedagogue's point of view. Here we have simply another phrasing of the central question whether what is desired is the transfer of a part of the law-school curriculum or the creation of a new course, a branch of the study of business.

A TYPICAL "CASE"

A typical case may be taken from the province of guaranty. A called at B's wholesale candy house with his nephew, X. He asked B to extend sufficient credit to young X, as a beginner, to enable him to engage in the retail business. B was willing to open the new account and after estimating the amount of credit that would be needed and proper under the circumstances wrote the following words on his own letterhead: "Please extend credit to my nephew, X, for five hundred dollars, for which I agree to be responsible." This document he handed to A for his signature. A signed. X bought four hundred dollars' worth of goods as his first bill, and thereafter made a practice of paying small amounts weekly and of buying additional goods as he needed them. The total amount of credit extended at any one time never exceeded five hundred dollars. After several years of such transactions, X dropped out of business owing B five hundred dollars, which B has since been unable to collect. He sued A on his guaranty. The latter defended on the ground that his guaranty was intended to cover only the first five hundred dollars. The court held that

the written agreement was ambiguous, and that evidence clear and convincing was necessary to show that a continuing guaranty was intended. In the absence of such proof the court construed the document as a limited guaranty, and the plaintiff, B, lost his case.

THE TWO POINTS OF VIEW

From the law student's point of view there is nothing very remarkable about this case. It raises several well-known questions, easily labeled, easily looked up in the digests, textbooks, and periodicals. Among other topics it involves the interpretation of contracts in general and of the contract of guaranty in particular. It suggests the doctrine, by no means universally held, that a guaranty should be construed in favor of the guarantor. Next, it entails many questions of evidence, for example, which, if any, of the attending circumstances are relevant and sufficient to establish the intent of the parties. Thus there is the admitted circumstance that a running account was contemplated between the creditor and the principal debtor. There is, again, a possibility—is it absolutely negatived by the document?—that something other than a guaranty was intended, perhaps an actual charging of the goods to the uncle instead of the nephew. Again, there has been more or less practical interpretation of the contract by the parties—to what extent will that be permitted to illuminate or obscure the issue? Are the peculiar usages, if any there be, of the candy trade with reference to credit relevant? A discussion of such questions stimulated now and then by the skill of the instructor in suggesting hypothetical permutations of the case leads to the big question from the law-school point of view, "Is the doctrine of the case sound?" And soundness means conformity to tradition. Does the case fit in with the principles laid down in the great collection of Anglo-American legal decisions in similar cases—or is it a freak? Only a Freshman or a finished jurist would think of going farther and asking whether the decision is sensible.

We may well imagine a law teacher holding out the case before his class by suggesting, after himself making a very careful study, that there are eleven or thirteen or seventeen different theories by which the case may be upheld, and stimulating his class to

discover some of these theories, and we may leave them discussing their views with very edifying results so far as facility in the handling of legal principles is concerned.

An attempt to transfer this whole process to a class in business science can meet with only partial success. It is unreasonable, in the first place, to expect the class to have a sufficient grasp of the legal principles involved to enable the students to hold up their end of the discussion. But, overlooking this difficulty altogether, are they vitally concerned about the soundness or unsoundness of the case, in the peculiar sense in which soundness is used in such matters? Is it their business to make fine distinctions for the sake of forcing apparently conflicting decisions into the same mold? Are they really served by the process of analyzing away the business transaction (the guaranty) and leaving only a framework of legal conceptions to ponder over? Remember, the business student does not expect to be his own lawyer, but rather to become an expert of a far different kind. His point of view is that of a man charged with the execution of general plans made by others and left in a measure to his own resources in the devising of particular means. The difference in the points of view of such students and of law students will be understood by any lawyer if I suggest that it is parallel to the difference between telling your law partner that the judge has decided against you because he held the guaranty limited, and the necessity of breaking the same news to your client. The latter can see one big fact, and only one: he had a written guaranty and you were unable to collect on it—there is something rotten in the state!

THE TWO PURPOSES

This difference in points of view will become clearer if we reflect for a moment on the practical lessons drawn from the case by the business man and by the lawyer. It is not necessary to accuse the man of law of smelling fat fees to say that he does not begin to despise the law of guaranty at all because of what may seem to be a miscarriage of justice in a particular case. I shall not go so far as to say that he respects that law all the more because of its devious ways—but he does learn to look in it for more than he

sees on the surface. In the future he will not despair so readily as he might have over either side of a guaranty tangle that may present itself to him. His practical lesson is to probe deeply, to reason with nicety, and to judge slowly in guaranty matters.

The business man can hardly be expected to learn his lesson in just this way. To him, I venture to say, the outstanding moral to the tale is that a guaranty is loaded with powder and ball—or at least that it's not a fool-proof weapon. Now it is quite necessary for him to learn this some time. If he doesn't learn it in school, he will probably learn it some day at a far greater cost in business. His first reaction, like that of your disappointed client, is that he will never again take a guaranty from anybody. Whether he eventually recedes from this safety-first position and makes his compromise with necessity by taking guaranties in a form first passed on by a lawyer, will depend on the exigencies of the particular business in which he engages, and its credit conditions. But the big lesson of the case is that the law imposes certain limitations upon the business machinery to which it gives effect. One might almost say that the moral the business student draws is quite the opposite of that drawn by the law student. Instead of, "Drink deep in the law of guaranty," it is rather, "Taste not of that poisoned spring at all."

In thus testing a legal instrument by business ends the layman is taking a page out of the jurisprudence of today more effectively than the professional lawyer generally can. There are, of course, some lawyers and law students who are by no means blind to the fact that law must in the long run be adapted to the needs of society, and that a failure of a legal instrument like the guaranty, drawn from the traditional store of the law, for practical business purposes, is quite as palpable and as serious as the failure of a weapon drawn from a medieval arsenal to meet the needs of modern warfare. The history of law, like the history of warfare, is full of accounts of institutions and instrumentalities that have had to be refashioned or abandoned as new situations arose. Incidentally it may be noted that this process has been furthered as a result of practical needs such as that of the business man in this case. Only rarely, and only in comparatively recent times, has the process been

helped by the conscious criticism of the theoretical jurist. Of course the business student who touches law only incidentally is neither sufficiently interested in reforming the law nor adequately prepared to take into consideration all of the elements that go into the problem of the fitting of law as a means to an end. But jurists would do well to learn from some of the cases some of the lessons that seem most obvious to the business world.

Thus the teaching of law in collegiate schools of business may, through the development of a point of view, lead to valuable gains in jurisprudence that will redound to the benefit of the law schools and men of law generally. As Dean Pound once remarked in an address before a meeting of commercial lawyers, "May we not hope that today when we are testing the applicability of the nineteenth-century law, fashioned for a pioneer, rural agricultural community, to the industrial urban community of the twentieth century, and shaping it to the needs of a transformed people, once more the commercial lawyer will be in the van of progress?"[1] All that I would add to this hope is the suggestion that a part of this important function belongs to the business expert who looks at the law through business eyes rather than at business through legal eyes.

THE TWO MENTAL BACKGROUNDS

Here we approach a more vital difference between law-school law and business-school law than any yet considered. There is something more fundamental than a difference in point of view based on a difference in the immediate object in view. It is the bigger difference in background, a difference that controls viewpoints, as habits control particular actions. After all, there is something more carried away from an effective teacher than the stuff consciously noted down in a book for future use. The real lesson of importance is that which becomes part of the mental equipment of the student and fits into positions already provided to receive it. Now take the guaranty case before us. The principles which the law student extracts are placed side by side with other legal principles. In this case the digest head that suggests

[1] *Commercial Law League of America, Bulletin 1*, XXII (1917), 608.

itself is guaranty, and as the matter is taught today (under nineteenth-century influences) it is a subhead of contract. The principle learned takes its place alongside the general principle of contractual interpretation that the intent of the parties (more or less artificially ascertained) governs the interpretation of the document. Perhaps a historian of law looking behind the nineteenth century, or a jurist looking forward can see something in guaranty law that smacks of status rather than of contract,[1] but even with them the principles with which the case becomes associated are legal principles.

Let us, on the other hand, consider the larger relations of our illustrative case in the business student's experience. He has learned that a certain credit instrument is technical and in at least one respect not quite safe. The business problem presented by the case is the safeguarding of the interests of the creditor, where, in view of the situation of the debtor, the ordinary safeguards provided by law are inadequate. The whole history of credit is a series of devices invented by business needs, out of which or into which the law brings its principles. Professor Wigmore has shown how in primitive society the pledge idea gradually gave rise to the more or less abstract idea of credit.[2] But has not the same process been frequently repeated at every stage of legal development? The mortgage and other gages were conveyances to secure the interests of the creditor whom the law failed to protect as such. In more recent times conditional sales were devised on the basis of a similar deficiency, real or imaginary, in our credit laws as applied to certain cases. In course of time the law has learned to deal with the debt as the essential thing in most of these transactions, but each bears unmistakable marks of its origin. The mortgage cannot be understood without a study of the law of conveyance; the pledge cannot be understood without a study of possession in the common law; the conditional sale is governed by the law of sales. Thus when we consider two credit devices as alternatives in a particular case, the legal considerations that must be thrown into the balance will have to be brought together

[1] See "The Standardizing of Contracts," *Yale Law Journal*, XXVII (1917), 34.

[2] "The Pledge Idea," *Harvard Law Review*, X, 341.

from widely divergent parts of the digest. In fact, to most lawyers it will seem puzzling to suggest that such devices are ever looked upon as alternatives, the principles involved in them are so different.

THE DIFFUSION OF A BUSINESS TOPIC IN THE DIGESTS

Let us group here—for so far as I know it is not done in any book—some of these instrumentalities with similar functions, regardless of the wide variety of legal principles involved. This digression will serve the double purpose of showing how and suggesting why a business topic, like credit instruments and safeguards, is scattered throughout the nooks and crannies of the legal digests. Let the student approach this subject as a business problem, the problem of seeking credit for his undertaking. What safeguard has he to offer? In the first place, he will probably have to submit a financial statement, either directly to the prospective creditor, or indirectly through one of the established mercantile agencies. This practical business device for putting credit on a sound basis is gradually coming to be recognized by the law. Old rules are just beginning to be applied by courts in a way to give the same effect to such statements in court as is actually given to them in business, and new statutes are being multiplied with the same end in view. But the statement alone, we shall assume, does not enable him to pass the scrutiny of a meticulous credit department. Some further security is necessary. Mortgages, real and personal, pledges, guaranty, and suretyship, including the signatures of friends on the face and on the back of notes, flash into the would-be debtor's mind. Perhaps the creditor is already supplied with a reasonable amount of credit-indemnity insurance. Perhaps the business is such that it is practicable to give effect to a lien, either on the basis of the express terms of the contract or such terms as may be supplied from custom or statute. But let us suppose all of these methods exhausted or for some reason inapplicable; what is left? Despair reveals a wonderful supply of hidden resources. The credit-seeker begins to think of his intangible assets and expectancies. Why not assign claims as securities, or amounts expected to accrue from existing contracts? At this point let him stop to consider the ordinary difficulties in the collection of

debts, that naturally make creditors hesitate about taking risks. Can he not remove some of them in advance? As a despairing borrower he is willing to waive as many of these as the law will permit. The formalities of summons and the right to appeal go by the board. The borrower is, of course, willing to make the evidence against himself as clear as possible by giving a note, and to make assurance doubly sure he will sign an authority to enter judgment against himself on the note. He will make the note payable at his own bank, thus giving it the effect of a post-dated check. And why not give a post-dated check? Of course, the law has until recently refused to hear of such a thing, but in some lines of business it has nevertheless become a well-recognized and effective instrument. But, to continue our waivers, the borrower may be willing to give up exemptions and any other debtor's rights that his state may interpose. Still, let us suppose, either because the law steps in to check these waivers, or because of the extra-judicial doctrine of Shylock vs. Antonio, it does not seem wise to extend credit on such a basis, what remains? At this stage students and, I suppose, credit-seekers, make a great point of strong personal assurances, gentlemen's agreements, and points of honor. Of course, the purely personal relation and extra-legal sanctions play a very great part, a greater part than lawyers suppose, in the framework of our credit system. But business is business. At any rate, the credit-seeker has not begun to exhaust the possibilities of credit safeguards under the law.

His credit is pledged to the limit and he needs more goods. Suddenly he sees a light, and begins to think of certain substitutes for credit, and suggests what is frequently suggested in such cases, though not exactly on the basis of any law made and provided for them. He may take goods on consignment. Or he may become the creditor's *del credere* agent—perhaps that hard-hearted and hard-headed gentleman will be satisfied with the triple chance of getting his money out of the retailer, or out of the customer, or out of the goods. Perhaps something more than an interest in the particular goods may be required by the creditor. He may want a hand in the control of the debtor's business. One may go the whole length of transferring the business to his creditor and become

nominally the manager with certain privileges of buying the business back. Perhaps in such a case the debtor pays the cost of a surety company's bond for the further protection of the creditor. Or the creditor may simply be given a power of control in the business by being constituted a stockholder and director in a corporation running the business. The list of methods might be increased almost endlessly. Where borrower and lender are desirous of creating a safeguard, it is not difficult to invent one. I have even known of a case where a borrower agreed to employ his creditor as his bookkeeper, so that the latter could see that the borrower's affairs were properly managed and his money safe.

To the lawyer, all of these subjects are simply unrelated, though time and a beneficent ignorance of our courts are gradually rubbing away some of the theoretic differences between two ways of doing the same thing. To the business student it is not enough, however, that he will recur to credit instruments in a hundred places if he studies mortgages, bills and notes, guaranty and suretyship, corporations and partnership, liens and pledges, assignments, agency, sales, and a little of every other head in the digest. To understand credit he must study the actual credit instruments in use in business, as so much law in action, and must be directed to such parts of our law in books as is necessary to explain them.

I have proceeded in correct pedagogic fashion, I believe, from the particular to the general, from a guaranty case to the whole subject of credit devices. What I have said, however, will apply *mutatis mutandis* even to the larger and larger brackets embracing all the rest of business law. Besides particular credit devices there will be included under the relation of debtor and creditor the normal legal provisions for the collection of debts in the absence of special agreements. Then, besides this relation, there are other business relations both within and outside of the business establishment. The most fundamental of these is that of buyer and seller. Analyzed from a business point of view, this begins with the process of holding out, soliciting, and negotiating, or salesmanship in the large sense in which advertising is included, rather than with the contract of the books, that begins with an offer and is consummated by an acceptance.

METHODS IN THE TWO CLASSES

The moment we attempt to put these theories into practice we are checked by the realization that we are pioneers. It is idle to quibble about how the railroads in our new province will be managed, before there is even a footpath hewn. There is almost a hopeless dearth of literature on law from the business point of view, if we bar a little adverse criticism aimed chiefly at antiquated procedure. I am not overlooking the long line of books on business law, from Gerard Malyne's *Lex Mercatoria* (1622) to Samuel Williston's *Commercial and Banking Law* (1918).[1] But ever since the law merchant has been a part of the law of the land these books have shown a tendency to be merely such fragments of law books as might conceivably be of use to a business man. And such eclectic books, whether case books or texts, reflect the methods and theories—I might almost say the prejudices—in vogue among lawyers for the time being.

Thus the case method as used in American law schools today, wonderfully effective as it is, is a reflection of certain inarticulate theories of law connected with the historical and analytical schools of jurisprudence.[2] But the very act of teaching law as a means to business ends is a departure from the favorite theories of these schools and an approximation to the theories of the more recent schools that consider the law as a social phenomenon with a social function. Many years will probably roll by before the need of an essentially new method will be realized in the law schools, but the same need is very concretely felt in such a narrow and specialized application and criticism of law as the collegiate business school must undertake. Some day the legal profession will awake to the realization that the business facts which it has been refusing to consider are being forced, like the special facts that constituted equity four or five centuries ago, into new tribunals of the type of the Interstate Commerce Commission. When this happens,

[1] Most of them are mentioned in the essay above referred to, *Journal of Political Economy*, XXIII, 539, 547, and 550. Among the later books needed to bring the bibliography up to date are: Williston, 1911 (revised 1913, 1915, 1918); Bacon, 1913; Clements and Waterson, 1914; Bush, 1917; Feger, 1917; Montague, 1917; Reed (cases), 1917; Conyngton, 1918.

[2] Cf. "The Schools of Jurisprudence," *Harvard Law Review*, XXXI, 408.

it is conceivable that the body of fact and theory that the legal departments of the collegiate schools of business will build up by that time will be devoured with avidity by the lawyers.

That movements are being made, however feeble, in some of the directions I have indicated, may be suggested by a few illustrations drawn from the current literature and other developments in business law.

1. Most of the literature of note on commercial law in the first half of the nineteenth century was primarily intended for lawyers. Story's books were, of course, the greatest. The next fifty years witnessed the development of commercial law books that were handbooks for business men. Parsons was perhaps the pioneer in this field. The twentieth-century books on the subject have nearly all been schoolbooks. If but one is to be chosen to represent the type, perhaps it should be Huffcut's little book. The books added in the last few years, including a few case books, continue this tradition and show a clear recognition of the distinctness of the problem of teaching law in business courses.[1]

2. The difference between the business lesson and the law lesson is rather amusingly suggested in one book bearing the date of 1918. In Conyngton's *Business Law* every discussion is followed by some such practical note as the following:

> Write all contracts. Never trust to an oral understanding [p. 42].
>
> It is not safe to have any business dealings with a minor [p. 33].
>
> The onerous character of partnership liability demands prudence in selecting a partner [p. 266].
>
> It is always most satisfactory to have a distinct understanding as to prices for services rendered. Even lawyers, dentists, and plumbers sometimes have "kicks" coming about their valuation of their services [p. 46].

Some of these lessons are perhaps as crude as they are shrewd. They remind one of the famous advice of *Punch* to a young man about to be married, "Don't." But they are an attempt to put into writing some of the strongest and most valuable impressions that the business student carries away from his course.

3. Several of the books, consciously or unconsciously, are emphasizing the value of the business information that can be gathered from the cases. This, I take it, is what one book (Bush)

[1] *Journal of Political Economy*, XXIII, 545.

means by the expression used in several places: "to provide illustrative examples with informational as well as applicational value." At any rate, Feger's *Business Law* (1917) mentions as one of its objects: "to acquaint the student with the usages and customs of business." [1]

4. An interesting departure from the inarticulate jurisprudence of the law-school methods is illustrated even in some of the case books and other books by law-school men. It is notorious that our law schools have been persistent in their refusal to pay any attention to statutes. What is the use of such learning, they reason, if a stupid legislature can repeal all of your knowledge at one fell swoop? But the business man faces such realities that he cannot afford to postpone the ascertainment of whether any statute "interferes with" the law on a particular subject until the last minute. Accordingly we find the Sales Act fully set out in Mr. Bays's cases, and the Negotiable Instruments Act frankly made the basis of his treatment of that subject. Lien laws and similar statutes come in for their share of necessary attention. The same may be said of Professor Williston's book prepared for the American Institute of Banking.

5. Studies of the comparative value of business methods involving legal considerations as well as others are not very common. Some studies have been made from this point of view of the relative merits of partnerships and corporations for the same business ends. The classes in the Harvard Graduate School of Business Administration have, I am told, systematically pursued this type of comparative study throughout an entire course. A good illustration of the possibilities in this type of study is contained in a pamphlet by my former colleague, Mr. Charles W. Dupuis, in which he shows the advantages of trade acceptances over open-book accounts in connection with the provisions of the Federal Reserve Act.

[1] In this connection the title that has become popular in the twentieth-century books may have a mild significance. The oldest books were labeled *Lex Mercatoria* or "Mercantile Law," names suggesting a separate system of law. Later "Commercial Law" came into vogue, a name somewhat looser in its connotation, and yet limited to certain types of enterprise. The newer books and courses seem to prefer the expression "Business Law," a term of the widest scope and yet suggestive of a definite point of view.

6. The outlines of the law courses actually given in collegiate schools of business are beginning to show a tendency to throw over the old law-school nomenclature. An approximation to some outline based on business facts is apparent. Instead of contracts, bills and notes, and corporations, we find types of business relations grouped together. The tendency of most of the schools at present seems to be toward three general courses in business law: the legal relation of buyer and seller, the legal relation of debtor and creditor, and the law of business organization.

7. Perhaps the most important developments, however, must be sought, for the present, in the actual classrooms. Even if the teacher is primarily interested and learned in the legal problem, it is the business problem that the inquisitive student forces him to discern.

There is one respect in which the courses offered the two classes of students should not differ. In this pioneer stage of the college of business, however, I am afraid there are some instances in which this is the only respect wherein they do differ. Within its respective field each calls for thorough scholarship. A business man's law course should not be simply a superficial law course. If it is infinitely smaller than the law-school curriculum in some respects, it should be larger in other respects. We must get at the law in the cases, and then dig deeper for the business experience embodied in them—and why not? Are not the repositories of our court proceedings, though heretofore used for a single narrow purpose, among the most important records of the development of our entire civilization?

NATHAN ISAACS

HARVARD LAW SCHOOL

DISCUSSION BY L. F. SCHAUB

I find myself in such complete agreement with the views expressed in the admirable paper by Mr. Isaacs that the only alternative to a reiteration of the points made in the paper is to make my remarks supplementary in character. With this in view, I shall discuss three phases of the subject: First, the value of law instruction to men planning for a business career; second, the aim of such instruction; third, the method of the instruction. In reality the three divisions lock, inasmuch as one's view of what should be the aim of the instruc-